

Case 3:05-cv-03537-MMC Document 40 Filed 06/22/06 Page 1 of 3

United States District Court

For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10
11 RICHARD SLEZAK,
12 Plaintiff,
13 v.
14 TCIF, et al.,
15 Defendants

No. C-05-3537 MMC

**ORDER TREATING DEFENDANTS'
MOTION TO DISMISS AS MOTION FOR
SUMMARY JUDGMENT; SETTING
BRIEFING SCHEDULE**

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17 Before the Court is the motion, filed April 13, 2006 by defendants TCIF LLC ("TCIF")
18 and Select Portfolio Servicing, Inc. ("SPS"), to dismiss plaintiff Richard Slezak's First
19 Amended Complaint ("FAC"). By order filed May 16, 2006, the Court granted plaintiff's
20 application to consider his untimely opposition, and afforded defendants the opportunity to
21 address in their reply a threshold issue, specifically, whether on November 16, 2004, the
22 date IndyMac Bank ("IndyMac") discharged plaintiff from any obligations plaintiff had to
23 IndyMac, IndyMac held an interest in plaintiff's real property. In so doing, the Court made
24 the observation that judicially-noticeable documents might be of assistance in resolving
25 such threshold issue.

26 On June 9, 2006, defendants filed their reply. In support thereof, defendants offer a
27 certified copy of an Assignment of Deed of Trust/Mortgage ("Assignment"), recorded in the
28 San Francisco Assessor-Recorder's Office on March 16, 2005, which indicates IndyMac

1 transferred its interest in the subject real property to TCIF. (See Defs.' Req. for Judicial
2 Notice Ex. C.) The Assignment is a document of which the Court may take judicial notice.
3 See, e.g., Hotel Employees and Restaurant Employees Local 2 v. Vista Inn Management
4 Co., 393 F. Supp. 2d 972 (N.D. Cal. 2005) (taking judicial notice of deeds recorded with
5 San Francisco Assessor-Recorder's Office). As defendants acknowledge, however, the
6 Assignment does not indicate the date on which IndyMac transferred its interest in the
7 subject real property to TCIF. Consequently, the Assignment does not resolve the
8 threshold issue identified by the Court in its May 16, 2006 order.

9 Also in support of their reply, defendants offer a copy of a Loan Purchase and Sale
10 Agreement ("Sale Agreement") between IndyMac and TCIF, under which IndyMac
11 transferred its interest in the subject property to TCIF on December 30, 2002. (See
12 Samberg Decl. Ex. A.) Along with the Sale Agreement, defendants have submitted the
13 declaration of Mitchell D. Samberg ("Samberg"), a managing officer of TCIF, who states
14 that "[d]ue to the large volume of mortgages that TCIF buys and sells on the secondary
15 market, it is not unusual for a significant lapse of time to occur between the date of the sale
16 and the recording of the Assignment." (See id. ¶ 4.) The Sale Agreement and the
17 Samberg Declaration are not documents of which the Court may take judicial notice,
18 however. Consequently, the Court cannot consider such documents in the context of a
19 motion to dismiss. Nevertheless, because the evidence presented, if undisputed, would
20 resolve the threshold issue of whether IndyMac held an interest in plaintiff's real property as
21 of November 16, 2004, the Court will not exclude the evidence and, instead, will "treat" the
22 motion as a motion for summary judgment made pursuant to Rule 56 of the Federal Rules
23 of Civil Procedure. See Fed. R. Civ. P. 12(b) (providing where, in support of motion to
24 dismiss, "matters outside the pleadings are presented to and not excluded by the court, the
25 motion shall be treated as one for summary judgment").

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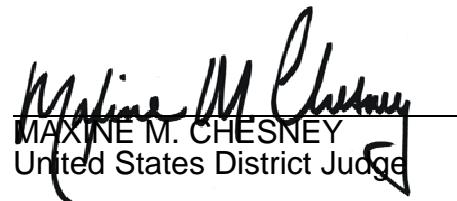
1 Because plaintiff has not had an opportunity to respond to defendants' evidence as
2 to the date on which IndyMac transferred its interest in the subject real property to TCIF,
3 the Court hereby SETS the following briefing schedule:

4 1. Plaintiff shall file and serve on defendants, no later than July 14, 2006, his
5 opposition to defendants' motion, now treated as a motion for summary judgment on the
6 issue of whether IndyMac held an interest in the subject real property on November 16,
7 2004. In opposing such motion, plaintiff is referred to Rule 56(a)-(g) of the Federal Rules of
8 Civil Procedure. If plaintiff does not file opposition by July 14, 2006, the Court will deem
9 defendants' motion submitted as of that date.

10 2. If plaintiff files opposition by July 14, 2006, defendants shall file their reply, if any,
11 no later than July 28, 2006, and the motion will be deemed under submission as of that
12 date.

13 **IT IS SO ORDERED.**

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15 Dated: June 22, 2006
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MAXINE M. CHESNEY
United States District Judge